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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Kolela Mpoyo,

9 Plaintiff,

10 vs.

11 FIS Management Services, LLC,

12 Defendant.
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No. CV-17-04307-PHX-SPL

ORDER

15 Before the Court are Plaintiff's Motion to Modify Subpoena Duces Tecum (Doc.
16 69), to which there is no response; Defendant's Motion for Sanctions, Dismissal and
17 Expenses for Plaintiff's Failure to Appear for Deposition (Doc. 54), Plaintiff's Response
18 (Doc. 63), and Defendant's Reply (Doc. 67); Plaintiff's Motion for Protective Order
19 Relating to Plaintiff's Confidential Health Information and Motion for Giving Permission
20 to File a Motion for Leave to Amend Pleadings (Doc. 62), Defendant's Response (Doc.
21 64), and Plaintiff's Reply (Doc. 68); and the parties' Joint Notice of Discovery Dispute
22 (Doc. 75).

23 **I. Motion to Modify**

24 Having reviewed the motion to modify Plaintiff's subpoena duces tecum, the Court
25 will grant it. Accordingly, it is ordered that Plaintiff's Motion to Modify Subpoena Duces
26 Tecum (Doc. 69) is **granted**.

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1 **II. Motion for Sanctions**

2 A court may sanction a party, upon motion, for failing to appear for the party's own
3 deposition. Fed. R. Civ. P. 37(d)(1)(A)(i); *see Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d
4 1218, 1222 (9th Cir. 2018). In doing so, the Court may order any item listed under Rule
5 37(b)(2)(A)(i)-(vi) as a sanction against the offending party. Fed. R. Civ. P. 37(d)(3).
6 Additionally, the court must require the offending party to pay the reasonable expenses,
7 including attorney's fees, caused by its failure to appear at its own deposition. *See* Fed. R.
8 Civ. P. 37(d)(3).

9 After reviewing the briefing, the Court finds that Defendant has been prejudiced by
10 Plaintiff's failure to appear for his deposition. However, the Court is unwilling to dismiss
11 Plaintiff's complaint as a remedy.¹ Instead, the Court will require Plaintiff to pay the
12 reasonable expenses, including attorney's fees, caused by Plaintiff's failure to appear for
13 his own deposition. To the extent Plaintiff has still not appeared for his deposition, this
14 Order also puts Plaintiff on notice that any future failure to appear for his deposition could
15 result in the dismissal of his case or any other sanction pursuant to Rule 37(d). Defendant
16 will have fourteen (14) days to submit its costs and fees associated with bringing this
17 motion. Accordingly, Defendant's motion for sanctions (Doc. 54) is **denied in part** and
18 **granted in part**, to the extent the Court will not dismiss Plaintiff's complaint but will
19 assess him the appropriate fees and costs.

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24 ¹ The Court notes, however, that Plaintiff's attempt to wait until the last minute to
25 file an "objection" to his deposition is alarming. While the Court is not dismissing
26 Plaintiff's case, it admonishes Plaintiff's behavior. There is no reason Plaintiff could not
27 have picked up his telephone and called Defendant to reschedule the deposition prior to
28 January 11, 2019, if Plaintiff's true worry was that the date of the deposition was too close
to the end of discovery. Furthermore, Defendant's email asking to move the deposition to
two days later due to an illness (1) made clear that the deposition would be moved only if
Plaintiff agreed and confirmed and (2) did not show any "bad faith" in attempting to move
the deposition deadline. Plaintiff's behavior here was simply unwarranted.

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a. Protective Order

Having considered the Plaintiff's Motion for Protective Order and the proposed Stipulated Protective Order, and finding good cause appearing, the Court will **grant** a protective order to seal Plaintiff's resume and application materials.

b. Leave to Amend

Plaintiff argues that certain documents obtained from a subpoena of HealthFitness reveal HIPAA violations and that certain EEOC documents are “missing” from Defendant’s disclosure. (Doc. 62 at 2-3.) He also argues that the Government shutdown caused delay in obtaining certain EEOC documents. (Doc. 62 at 3-4.) Defendant argues that Plaintiff is simply attempting, yet again, to extend the discovery deadline and to delay this litigation. (Doc. 62 at 1.) Defendant argues that Plaintiff did not act reasonably in pursuing discovery and has not shown any reason to reopen the pleadings more than a year after the filing of his complaint. (Doc. 64 at 2.) Having reviewed the briefing, the Court finds that Plaintiff has not shown good cause for amending his Complaint at this date in the litigation. Thus, the Court **denies** Plaintiff’s request for permission for leave to amend his pleadings.

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1 **IV. Notice of Discovery Dispute**

2 Having reviewed the parties' notice of discovery dispute (Doc. 75), the Court will
3 schedule a hearing to address the disputed items. The parties should be prepared to address
4 each item and explain why each is or is not relevant, what is inhibiting its disclosure, and
5 why.

6 **V. Conclusion**

7 After reviewing all the motions and the discovery notice, the Court will extend the
8 discovery and dispositive motion deadlines. The discovery deadline is now **May 27, 2019**,
9 and the dispositive motion deadline is **June 18, 2019**.

10 **IT IS ORDERED:**

- 11 1. That Plaintiff's Motion to Modify Subpoena *Duces Tecum* (Doc. 69) is
12 **granted**;
- 13 2. That Defendant's Motion for Sanctions (Doc. 54) is **granted in part** and
14 **denied in part**;
- 15 3. That Defendant shall have **fourteen (14) days** to submit its costs and fees
16 associated with bringing its motion for sanctions;
- 17 4. That Plaintiff's Motion for Protective Order and Motion for Giving
18 Permission to File a Motion for Leave to Amend Pleadings (Doc. 62) is
19 **granted in part** and **denied in part**; and
- 20 5. That, pursuant to Federal Rule of Civil Procedure 26(c), Plaintiff's resume
21 and application materials are to be kept **confidential**; and

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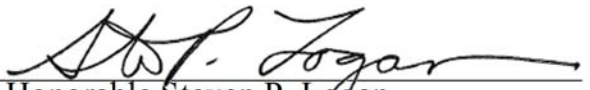
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6. That, pursuant to the parties' Joint Notice of Discovery Dispute, a hearing is set to address the matter on **May 23, 2019 at 10:00 a.m.** before the Honorable Judge Steven P. Logan, United States District Judge, in the Sandra Day O'Connor United States Courthouse, located at 401 West Washington Street, Phoenix, Arizona 85003, 5th Floor, Courtroom 501.

Dated this 24th day of April, 2019.


Honorable Steven P. Logan
United States District Judge